Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

THOMAS L. KNIGHT,

Petitioner,

v.

CHICAGO TRIBUNE COMPANY, a corporation, MAURICE POSSLEY and KEN ARMSTRONG,

Respondents.

On Petition For Writ Of Certiorari To The Appellate Court Of Illinois

PETITION FOR WRIT OF CERTIORARI

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LIST OF PARTIES

Petitioner:	Thomas L. Knight 2150 Manchester Road Wheaton, IL 60187
Respondents:	Chicago Tribune Company (parent company: Tribune Company)
	Maurice Possley
	Kenneth Armstrong

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CITATION OF OPINIONS IN THE CASE

On May 20, 2005, the Circuit Court of Cook County, Illinois, Hon. Robert E. Gordon, presiding, entered judgment on a jury verdict in favor of the Defendants in the case then entitled *Thomas L. Knight v. Chicago Tribune Co. and Maurice Possley*, No. 00 L 4988. The Court had previously granted a directed verdict in favor of the Defendant Kenneth Armstrong at the close of the Plaintiff's case so he was no longer in the caption. The judgment on the jury verdict and the jury verdict forms are included in the Appendix. On February 23, 2006, the trial judge denied Petitioner-Plaintiff's motion for a new trial. That written ruling is also included in the Appendix.

Appeal was taken by Petitioner to the Illinois Appellate Court. On September 10, 2008, the Appellate Court issued an opinion affirming the trial Court judgment. That published appellate opinion, *Knight v. Chicago Tribune Co., et al.*, 385 Ill.App.3d 347, 895 N.E.2d 1007 (1st Dist. 2008), is included in the Appendix. Petitioner sought leave to appeal the appellate court decision before the Illinois Supreme Court. On January 28, 2009, the Illinois Supreme Court denied leave to appeal in *Knight v. Chicago Tribune Co., et al.*, 231 Ill.2d 633, 902 N.E.2d 1085 (January 28, 2009). See Appendix for that order.

STATEMENT OF JURISDICTION

On January 28, 2009, the Illinois Supreme Court denied Petitioner's (then plaintiff's) petition for leave to appeal from the appellate court decision affirming the trial court's judgment on the jury verdict in favor of the Respondents (then defendants). The mandate from that decision has issued. Petitioner is filing this petition for writ of certiorari within 90 days of that January 28, 2009 decision by the Illinois Supreme Court.

The Court has jurisdiction to review this case under 28 U.S.C. §1257, because the decision of the Illinois Supreme Court is a final judgment of the highest court of the State of Illinois, and the case presents a claim under the Constitution of the United States.

CONSTITUTIONAL PROVISION INVOLVED

The First Amendment to the United States Constitution:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof, or abridging the freedom of speech, or of the press, or of the right of the people peacefully to assemble, and to petition the government for a redress of grievances.

STATEMENT OF THE CASE

Petitioner sued the Chicago Tribune Company and two of its reporters for having made what he claimed to be a false defamatory statement about him in a front page newspaper story. The Petitioner had been a prosecutor in a death penalty murder trial. The statement in the newspaper story said that shortly before the murder trial a forensic expert had told a grand jury that Petitioner had told him to "keep his mouth shut" about an opinion he held which was exculpatory of one of the defendants. The story then inaccurately claimed that Petitioner recruited other experts to give incriminating opinions as to the guilt of the defendant. Petitioner contended that the statement was defamatory *per se* because it accused him of criminal misconduct and lack of integrity in performing his professional duties.

At the trial of the defamation case, Petitioner tendered a jury instruction which set forth the gross negligence standard articulated by Justice Harlan in *Curtis Pub. Co. v. Butts*, 388 U.S. 130 (1967) in place of the actual malice standard from *New York Times v. Sullivan*, 376 U.S. 254 (1964). He also tendered an instruction with a preponderance of the evidence burden rather than the clear and convincing evidence burden as required by *New York Times* for proof of actual malice. The trial judge refused both of those instructions, as he was required to do, and instructed the jury in accordance with the *New York Times* case.

Petitioner also offered an instruction to inform the jury that the Court had determined that the statement was defamatory *per se* and that the jury would not decide that issue. That instruction too was refused by the trial judge. *Knight v. Chicago Tribune Co.*, 385 Ill.App.3d 347, 358, 895 N.E.2d 1007 (1st Dist. 2008). While the jury verdict in favor of the Respondents (then defendants) found by answer to special interrogatory that the statement was materially false, it answered other special interrogatories finding that the statement was not made with actual malice, and was not defamatory.

Petitioner renewed his arguments as to the above described jury instructions in his post-trial motion before the trial judge. The motion was denied. On appeal to the Illinois Appellate Court, Petitioner again argued that the instructions should have been given. The Appellate Court rejected the Petitioner's arguments and affirmed the trial court's judgment. *Id.* The Illinois Supreme Court's denial of Petitioner's request for leave to appeal from the Appellate court's decision was a final decision in the case allowing the Appellate Court's determination to stand.

Some of the evidence as to whether the jury could have found gross negligence in this case is set out in the appellate court opinion, which is included as an appendix to this petition. *Knight v. Chicago Tribune Co.*, *supra*, at 385 Ill.App.3d 351-52 & 356-57. Essentially, the reporter admitted at trial that he knew that the forensic expert had not told the grand jury anything. The source of his statement in the

story was what an investigator had told the grand jury which allegedly was based on his interview with the forensic expert. The reporter also knew that the investigator had never claimed that the forensic expert had said that Petitioner had told him to keep his mouth shut about his opinion. Rather, the investigator claimed that the forensic expert had said that Petitioner had told him not to discuss his opinion with anyone.

At the defamation trial the forensic expert testified. He said that it was only after he had received a subpoena from the murder defendant's attorney that Petitioner had contacted him. Petitioner had simply asked him not to discuss the matter with anyone until he had first notified Petitioner – a practice which the expert said was usual when crime lab members were contacted by defense attorneys. The expert also testified that the investigator's account of what the expert had told him was inaccurate.

The explanation given by the reporter at the trial was that one of his editors did not like the vague phraseology in his draft of the story and had suggested that the story say that the forensic expert "told the grand jury." The reporter testified that at that point he forgot that the expert had not been before the grand jury. *Knight v. Chicago Tribune Co.*, *supra*, 385 Ill.App.3d at 351 & 357. The editor corroborated the reporter in that explanation. The appellate court opinion failed to mention that both the reporter and the editor had been impeached by

the fact that they had given no such explanation when questioned about the subject in their depositions.

The reporter's explanation for stating in the story that Petitioner had told the expert to keep his mouth shut about his opinion was that he thought it was a fair paraphrasing of what the investigator had reported. He admitted in his testimony at trial that he had not attempted to talk to the forensic expert to verify his story; nor had he asked Petitioner or his attorney if the information was correct, even though he was in contact with them about the news story.

There are many other relevant facts which were established in the record of this case. Some of those are set forth accurately in the appellate court opinion. Others would be added if the Court determines to accept this case for review. However, Petitioner, cognizant of the large number of petitions for certiorari the Court must consider, has attempted to limit this recitation to those facts which are necessary in order for the Court to decide whether this case properly presents an issue which it thinks should be addressed at this time on certiorari.

REASONS FOR GRANTING PETITION FOR WRIT OF CERTIORARI

It has been over 45 years since the Court, in *New York Times v. Sullivan*, 376 U.S. 254 (1964), first incorporated the actual malice standard as a

constitutional requirement for defamation cases by a public official; and 42 years since the Court, in a five-to-four split, concluded that the actual malice standard must be met in cases brought by public figures as well. *Curtis Pub. Co. v. Butts*, 388 U.S. 130 (1967) (as discussed in *Harte Hanks Communications v. Connaughton*, 491 U.S. 657, 665-66 (1989). Those decisions and their early progeny were an attempt by the Court to strike an appropriate balance between the constitutionally mandated need to allow adequate breathing space for the media to speak freely about the conduct of public persons, and the rights of public persons to obtain compensation for injury resulting from false defamatory statements. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 341-42 (1974). This petition takes no issue with the objective of striking an appropriate balance.

Rather, this petition is brought in the hope that the Court is willing to reconsider whether requiring the proof of actual malice by clear and convincing evidence is the appropriate balance today. During the four decades since those seminal decisions, it has become increasingly evident that the media industry is no longer the same as the Court understood it to be back then. The greater intensity of competition within and among the vast number of modern day media outlets has significantly increased the danger of false defamation of public figures. While the career of a reporter or the survival of a media outlet always may have depended upon getting a story out faster than the competition, the time frame has become

shorter and shorter to the point where there is great pressure not to take the time to verify the accuracy of a story. In addition, there are so many possible sources of news for consumers today that there is a tremendous incentive for a media outlet or reporter to publish a story which is of greater attraction to the public than his competitors.

Unfortunately, as those pressures have increased over the past four decades, the media outlets have become more cognizant of the extreme difficulty public figure plaintiffs face in trying to successfully prosecute a defamation case under the requirements of *New York Times v. Sullivan*. Thus, the risk of liability is perceived to be so slight that it provides no significant deterrent to reckless, or even intentional defamation of public figures by the media. These developments beg the question of whether – even if the *New York Times* rule struck the right balance in the 1960's – it is still the right balance in the 21st Century.

This case squarely and cleanly provides the Court the opportunity to consider appropriate alternatives to the actual malice formula enunciated in the *New York Times* case, at least as to public figure plaintiffs with *per se* defamation claims. The questions presented in this petition were adequately preserved for review by timely raising them in the trial court and the lower courts of review. The evidence produced by the Plaintiff was sufficient to meet the gross negligence standard of *Curtis Pub. Co. v. Butts*, 388 U.S. 130, 155 (1967). This clearly is a *per*

se defamation case. *See* Restatement (Second) of Torts §570 (177); *Bryson v. News America Publications, Inc.*, 174 Ill.2d 77, 87-88, 672 N.E.2d 1207, 1214-15(1996). And the Petitioner clearly was a public figure. (*Curtis Pub. Co. v. Butts*, *supra*, at 388 U.S. 154-55). Finally, the facts of this case illustrate the willingness or propensity of modern day media outlets to recklessly subjugate concern for accuracy, even when great harm to the subject of the story is apparent.

Petitioner asks that the Court select this case for review so that some adjustment may be made in public figure cases to the balance which was struck in *New York Times v. Sullivan*. The current law provides insufficient protection of the rights of public figures whose reputations are seriously harmed by media outlets and reporters who exhibit little concern for the accuracy of what they publish, even when it should be clear that inaccuracy will cause such harm. The risk of liability for defamation must be great enough to encourage the media to make a reasonable effort to verify information before they publish it, at least in those cases where the likelihood of serious harm is apparent. There must be sufficient incentive for them not to let their zeal to publish a story more eye-catching than that of their competitors blind them to their obligation to use ordinary care to avoid clearly injurious false defamation.

Adopting the gross negligence, or objective recklessness, standard would be an appropriate adjustment. For all of the reasons recited by Justice Harlan

on behalf of the Court in the *Butts* case (*supra*, at 388 U.S. 154-55), "the extreme departure from ordinary care standard" would retain the desired breathing space which the First Amendment requires; therefore, the press would not reasonably become reluctant to fairly criticize public figures. However, that objective standard would eliminate the overwhelming difficulty defamation victims currently face in public figure defamation cases. Under the actual malice standard, they must prove the subjective, quite specific knowledge of the reporter that the statement was false, or that he harbored a serious doubt of its truth. Without an admission of such knowledge by the reporter, if he denies the mental state at trial, it is very unlikely that a jury will find the circumstantial evidence sufficient to overcome that direct testimony, especially when the proof must be by clear and convincing evidence. Under the gross negligence standard, the jury can more fairly evaluate whether the circumstantial evidence – including most often, the failure to investigate or attempt to verify, or the reliance upon plainly unreliable sources – shows an extreme departure from the care which an ordinary journalist would have exercised. The direct denial of the reporter would not tend to have such a conclusive effect.

Changing the requirement of the burden of proof of actual malice from clear and convincing evidence to a preponderance of the evidence would also be an appropriate adjustment, either in addition to, or as an alternative to adopting the gross negligence

standard. As noted above, when the specific mental state of the reporter must be proven by clear and convincing evidence, the likelihood of being able to prove the case becomes very problematic in the great majority of defamation cases. Clear and convincing evidence is a very high burden. In Illinois it has been defined as "proof that leaves no reasonable doubt in the mind of the fact finder." *In re C.S.*, 383 Ill.App.3d 449, 452, 890 N.E.2d 1007, 1010 (1st Dist. 2008). It is hard to imagine, in the great majority of cases, how a plaintiff, employing the usual kind of circumstantial evidence, could satisfy that burden of proof when the standard is the specific knowledge of the reporter, and he denies that knowledge at trial.

Finally, if the Court is hesitant to adopt one or both of the above changes for all defamation cases brought by public figure plaintiffs, Petitioner suggests a third alternative. These changes could be made only for *per se* defamation cases. Defamation *per se* cases are those which fall into four generally accepted categories of plainly injurious false statements. *See* Restatement (Second) of Torts §570 (177); *Bryson v. News America Publications, Inc.*, 174 Ill.2d 77, 87-88, 672 N.E.2d 1207, 1214-15 (1996). Those categories are statements that impute upon the defamed party: (1) a criminal offense, (2) a loathsome disease, (3) a matter incompatible with his business, trade, profession, or office, or (4) serious sexual misconduct. *Id. See also, Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 372 (1974) (acknowledging the common law slander *per se* categories). The law finds these

types of statements to be inevitably damaging to one's reputation without regard to whether any specific damage can be shown. *See* Restatement (Second) of Torts §570 (177).

Because statements which are defamatory *per se* are so plainly damaging, Petitioner suggests that the Court could very reasonably conclude that the *New York Times* requirements should be relaxed in those defamation cases only. It would make sense that the Court require the media to take greater responsibility for trying to be accurate in publishing statements which are so universally recognized as being inherently damaging to the reputation of the person about whom the statement is made. Adopting the gross negligence standard and preponderance of the evidence burden for *per se* cases would fairly encourage the media to accept that responsibility in those cases where they should have no difficulty in recognizing the serious harm which would occur if the statement is false.

While obtaining relief in this case is very important to Petitioner, he has refrained from emphasizing that aspect of the case as a reason for granting this petition. He assumes that in most of the many thousands of other cases seeking certiorari, the cases are equally important to those petitioners.

Instead, and in the interest of avoiding undue burden on the Court's limited resources, Petitioner has tried to focus this Petition succinctly on matters necessary to the issue of whether this case is of

sufficient, broad-based, constitutional importance to be selected at this time for review. Petitioner earnestly believes that it is. Respect for the integrity of the press is very low. The media is seen by much of the public as just another big business industry. Petitioner believes that the Court will do a service to the First Amendment by encouraging the media to exercise greater care to avoid false defamation than they are willing to do on their own. Moreover, there is justifiable concern that the prevalence of false defamation of public figures by the media – which many have come to see as increasingly "tabloid" – is deterring citizens from participating in matters of public interest because of the risk that they or their families will be falsely maligned. Such public participation in government and public affairs is also a First Amendment interest that is worthy of recognition and consideration by the Court. For all these reasons, it is worthwhile for the Court to re-visit the appropriateness of the actual malice requirement as it relates to public figure cases.

CONCLUSION

Wherefore, Petitioner prays that the Court grant a writ of certiorari in this case and review it on its merits.

Respectfully submitted,

THOMAS L. KNIGHT
Petitioner, Pro Se

App. 1

895 N.E.2d 1007

Appellate Court of Illinois,
First District, Third Division.
Thomas L. KNIGHT, Plaintiff-Appellant,
v.
CHICAGO TRIBUNE COMPANY, a Corporation,
Maurice Possley and Ken Armstrong,
Defendants-Appellees.
No. 1-06-0957.

Sept. 10, 2008.

William L. Bowers, Chicago, for Plaintiff-Appellant.

H. Patrick Morris, David M. Macksey, Johnson & Bell, Ltd., Chicago, Charles L. Babcock, Nancy W. Hamilton, Jackson Walker LLP, Houston, TX, for Defendants-Appellees.

Presiding Justice MURPHY delivered the opinion of the court:

This defamation action involves a trial about a trial about a trial. Thomas Knight was an assistant State's Attorney who prosecuted Rolando Cruz for the murder of Jeanine Nicarico. Eventually the court acquitted Cruz. Other prosecutors later charged Knight with obstruction of justice. Knight also won an acquittal. Knight then sued Maurice Possley and his employer, the Chicago Tribune, accusing them of publishing falsehoods in their article about the prosecution against Knight on the charge of obstructing justice. The jurors found factual inaccuracies in the article. However, in response to a special interrogatory, they found that Knight failed to prove, by clear

and convincing evidence, that Possley acted with actual malice. The trial court entered judgment in favor of defendants based on the general verdict supported by the special finding.

On appeal Knight argues that the court instructed the jury erroneously on damages and erroneously admitted evidence of other negative publicity about Knight. Knight also contends that defense counsel's closing remarks deprived him of a fair trial. We find that the court's rulings, sustaining objections to the remarks at issue, cured any such error. Any errors in the admission of evidence on damages and the damages instructions had no effect on the dispositive finding that Knight failed to prove actual malice. Accordingly, we affirm the judgment entered in favor of defendants.

I. BACKGROUND

On February 25, 1983, police detectives in DuPage County went to the home of Tom and Pat Nicarico in response to a report that the Nicaricos could not find their daughter, Jeanine. The detectives saw that someone had kicked the front door open, and that person kicked hard enough to leave an impression of his boot. Two days later, Jeanine was found dead from several severe blows to the head.

An anonymous tip led police to question Alejandro Hernandez in March 1983. Police later charged Hernandez, Steven Buckley and Rolando Cruz with the murder. Thomas Knight led the prosecution. A

jury found Cruz and Hernandez guilty of murder. Our supreme court reversed the convictions and remanded for retrial. During a subsequent trial an officer admitted that he had lied in the prior trial about the evidence against Cruz. The judge acquitted Cruz.

A number of journalists published stories about the events leading to the prosecution and eventual acquittal of Cruz. Investigators began to look into the conduct of the police officers and attorneys who constructed the case against Cruz. Some of the investigators, including Steven Kirby, spoke to a grand jury about their findings. Kirby told the grand jury that he interviewed John Gorajczyk, who worked in the DuPage County crime lab in 1983. Gorajczyk compared Buckley's boots to the imprint on the Nicaricos' front door. He concluded that Buckley's boots did not make the imprint. Gorajczyk told the sheriff his findings. The next day the boots were not in the crime lab. Gorajczyk never wrote a report of his findings. Other experts subsequently compared Buckley's boots to the imprint and found a match.

During preparation for the trial of Cruz, Hernandez and Buckley, Knight learned of Gorajczyk's initial examination and asked Gorajczyk why he had not written a report. Gorajczyk told Knight he did not write a report because he had completed only a cursory examination, without any notes, before the boots left the crime lab. According to the transcript of Kirby's testimony to the grand jury, Kirby affirmed that "Knight's response was to tell Gorajczyk not to

discuss the matter with any one [*sic*] and not to report to anyone about his negative findings and his failure to write a report."

The grand jury indicted four police officers and three prosecutors, including Knight, for perjury and obstruction of justice in connection with their handling of the charges against Cruz, Hernandez and Buckley. Some newspapers referred to the four officers and three attorneys collectively as the DuPage 7.

Before the DuPage 7 trial began, Knight's attorney obtained in discovery transcripts of the grand jury proceedings which led to the indictments against the DuPage 7. Knight's attorney decided to send the complete transcripts, including the testimonies of all witnesses, to Ted Gregory, a reporter for the Chicago Tribune.

On January 12, 1999, the Tribune published an article entitled "Prosecution on trial in DuPage," by Maurice Possley and Ken Armstrong. The article appeared in a series entitled "Trial & Error: How Prosecutors Sacrifice Justice to Win." The reporters documented the incidents that led up to the indictments of the officers and prosecutors. In the article they stated:

> "At its core, the indictment of the DuPage 7 focuses on two key aspects of the case: that on the eve of the first trial of Cruz * * * [two detectives] concocted a lie – that Cruz had told them of having a 'vision' of the crime that included details only the killer would

know. That lie, according to the indictment, was endorsed and perpetuated by the prosecutors. In addition, prosecutors King and Kilander are accused of concealing notes that showed there was an admitted killer named Brian Dugan, a man who had already pleaded guilty to two other murders, including the killing of a 7-year-old girl.

* * *

* * * [Cruz] is expected to testify that what he told the officers and prosecutors during the initial days of the investigation – words that ultimately would become the basis for a case against him – was something he made up in hopes of cashing in on a $10,000 reward.

* * *

In the weeks following the discovery of Jeanine's body, Hernandez * * * told detectives * * * that three people committed the crime, including Buckley and someone named 'Ricky.'

While the detectives never found anybody named 'Ricky,' they picked up Buckley, who turned over a pair of his boots for comparison with the print on the front door. But Buckley denied any involvement in the crime.

Eager to capitalize on the reward, Hernandez and Cruz babbled incessantly to the detectives and the grand jury investigating Jeanine's murder. * * *

* * *

> As the trial approached, lead prosecutor Thomas Knight summoned John Gorajczyk, a shoe print examiner in the sheriff's police crime lab, to discuss his examination of Buckley's boots, according to the grand jury transcripts.
>
> Earlier, Gorajczyk had compared Buckley's boots to the print on the Nicarico door and concluded they didn't match. He did not write any report about his findings. Gorajczyk told the DuPage grand jury that Knight told him to keep his mouth shut about his conclusion and not to tell anyone that there was no written report.
>
> Knight then sent the print and boots to the Illinois State Police crime lab, where an examiner said he could not conclusively say if the boot matched or not. * * *
>
> Eventually, Knight settled on Louise Robbins, * * * who not only said Buckley's boots matched the door print, but that she could look at a shoe print and tell the height and race of the wearer. * * *
>
> The FBI lab later conducted its own tests and concluded that Buckley's boot did not match the print on the door." Maurice Possley & Ken Armstrong, *Prosecution on trial in DuPage,* Chicago Tribune, Jan. 12, 1999, at 1.

The trial court rescheduled Knight's trial, from January 19, 1999, to March 9, 1999, on the charge of

obstructing justice. The trial ended in acquittal for Knight.

In May 2000 Knight sued Possley, Armstrong and the Tribune for defamation. Knight's suit focused on defendants' false report that Gorajczyk testified that Knight told Gorajczyk to "keep his mouth shut about his conclusion" that Buckley's boot did not dent the Nicaricos' front door. Knight claimed that the false statement implied that he had obstructed justice. The trial court found that Knight stated a cause of action for defamation *per se*. Therefore, the trier of fact could presume that Knight suffered damages. See *Bryson v. News America Publications, Inc.*, 174 Ill.2d 77, 87, 220 Ill.Dec. 195, 672 N.E.2d 1207 (1996). However, as Knight admitted, the case presented an "evidentiary dispute about the appropriate amount of damages."

Knight moved to block evidence of radio and television programs, along with newspaper articles, that commented on the prosecution of Cruz. The trial court granted the motion in part, but permitted defendants to use a few stories relating directly to the boot experts.

At trial, Possley admitted that he knew Gorajczyk never testified before the grand jury that indicted Knight. Only Kirby testified to the grand jury about Gorajczyk's findings. In an early draft of the article, Possley wrote that "Gorajczyk recalled later" that Knight directed him not to discuss his findings. An editor thought the sentence vague. Possley suggested changing the passage by adding, "according to the

grand jury transcript." The editor rejected that suggestion because the prior paragraph included that phrase. The editor asked, "Can we just say 'Gorajczyk told the grand jury?'" Possley said, "Sure." At trial Possley explained that at the time of the editing, months after he first read the transcripts and under the pressure of a looming deadline for printing the article, he forgot that Kirby, not Gorajczyk, testified to the grand jury about the encounter.

Possley defended his statement that Knight told Gorajczyk to "keep his mouth shut." Possley claimed that his article accurately paraphrased Kirby's testimony that Knight told Gorajczyk "not to discuss the matter with any one [*sic*] and not to report to anyone about his negative findings." Possley admitted that he relied solely on the grand jury transcripts for that part of the story; he did not attempt to contact Gorajczyk to verify the facts as Kirby related them.

Gorajczyk testified that prior to the first trial of Cruz, Buckley and Hernandez, Buckley's attorney learned of the initial comparison of the boot with the door. The attorney subpoenaed Gorajczyk. Knight then contacted Gorajczyk to ask about the initial comparison. Gorajczyk described his examination and explained his decision not to write a report of the examination. Gorajczyk testified that Knight asked him "not to discuss this with anyone until [Gorajczyk] contacted [Knight] and * * * notified [Knight] that [Gorajczyk] was speaking with that person." Knight did not tell Gorajczyk to keep his mouth shut. Knight's request for notice "was the usual procedure

from all the attorneys" whenever someone contacted an employee of the crime lab. According to Gorajczyk, Kirby, in his testimony to the grand jury, reported their discussion inaccurately.

Knight admitted that he received a fair trial, as a member of the DuPage 7, on the charge of obstructing justice. He also admitted that the Tribune generally printed fair and accurate reports of the trial, even when it printed the reports Possley wrote.

The court permitted defendants to present to the jury a few publications concerning the conviction of Cruz. A segment of "American Justice" included the following report:

> "Thomas Knight known as the black knight for his hard charging style prosecuted the case. * * * [J]ust days before trial the prosecution suddenly announced that Cruz had made a statement tantamount to a confession a year and a half earlier.
>
> Two Du Page County detectives claimed that on May 9th, 1983, Cruz had told them about a dream he had had. * * * [T]he dream revealed details nearly identical to the Nicarico murder * * * . Cruz denied ever making the so-called 'vision statement.'
>
> * * *
>
> * * * [T]he detectives did not tape record the alleged statement, did not take any notes, and did not even file a report; nor did they follow up on this key piece of evidence the

very next day when they were taping an interview with Cruz.

* * *

* * * The case against Ste[v]en Buckley hinged on the boots he had handed over so willingly to police. The prosecution paid $1,000 a day to a forensic anthropologist who testified that Buckley and only Buckley could have kicked in the front door of the Nicarico home.

* * *

* * * One month before trial [the] Defense Attorney [for Buckley] got a tip that a prior expert who examined Buckley's boots * * * had ruled them out as a match. The sheriffs had actually retrieved the boots and instructed the [expert] not to file a report. A move that led the crime lab director to resign. Prosecutors never told the defense about that initial finding, a violation of Illinois law." *American Justice* (A & E television broadcast).

An article published in the Los Angeles Times in 1992 emphasized different aspects of the story:

"Ramon Mares came along. He and Cruz had been drinking * * * late one night in March, Mares told [a] Detective * * * . Cruz had turned emotional, had started sobbing. I know who killed the little girl in Naperville, Cruz had said. I know who did it. I was there. * * *

Years later, Mares would insist that Cruz hadn't really said, 'I was there.' Years later, Mares would testify that the DuPage prosecutors had pressured him into saying those words because that's what they wanted to hear. Years later, he would explain that he'd lied * * * because he was interested in the reward money.

To DuPage County Assistant State's Attorney Thomas Knight in the late spring of 1983, however, Mares was the clincher. Highly regarded as a ferociously effective prosecutor, Knight had grown close to the Nicarico family and determined to find their daughter's killer. He had done so, he now decided. Cruz, Hernandez and Buckley, out to do a burglary, had unexpectedly found a little girl at home. Jeanine could identify them, so they had killed her.* * * Knight was positive.

* * *

And yes, they had tied Ste[v]en Buckley's boot print to the murder, but only after they'd shopped the print to three different experts before finding one – Louise Robbins, a North Carolina anthropologist with self-described 'forensic' talents – willing to say the print on the Nicarico door was definitely Buckley's. * * * 'Louise Robbins arrives. This is the boot, she says. That'll be $10,000. So now we have evidence.'" Barry Siegel, *Presumed Guilty: An Illinois Murder Case Became a Test of Conscience Inside the System,* Los Angeles Times, Nov. 1, 1992, at 18.

When Knight rested in rebuttal, the court entered judgment in favor of Armstrong due to the lack of evidence tying Armstrong to the alleged defamation.

In closing defense counsel argued:

> "This 29-word needle is buried in a 5,000-word article and a 20,000-word series which was part of a massive media haystack of negative publicity about Mr. Knight, and the needle didn't cause him any damage.
>
> * * * I'm going to go into * * * Mr. Knight's reputation. * * * Either he negligently or knowingly prosecuted three innocent boys –
>
> MR. KNIGHT: Judge, I will object.
>
> THE COURT: Okay. Your objection is sustained * * *.
>
> * * *
>
> * * * Innocent people went to prison, some to Death Row.
>
> * * * It is important award-winning journalism and is shedding light on our societal problems so that people like Steve Buckley don't have to spend three years in prison when they are innocent.
>
> MR. KNIGHT: Object, your Honor.* * *
>
> THE COURT: Objection sustained."

Knight asked the court to instruct the jury:

"The Court has found that the statement published by the defendants which is at issue in this case was defamatory per se, so that is not an issue you will need to decide. * * * .

* * *

If you decide for the plaintiff on the question of liability, you must fix the amount of money which will reasonably and fairly compensate him for the following elements of damages:

Past and future injury to professional and personal reputation;

Past and future humiliation * * * ; and

Past and future loss of income and business opportunity."

The court refused both instructions. Instead, the court instructed the jury:

"The plaintiff has the burden of proving each of the following propositions: First, that the complained of statement was false in a material way.

Second, that the defendants published the complained of statement with actual malice and that they either knew that the statement was false or published it with a reckless disregard of whether the statement was true or not.

Third, that as a result of the complained of statement, the plaintiff sustained actual and/or presumed damages.

* * *

In order for you to find that the defendants published the complained of statement with actual malice, the plaintiff must prove by clear and convincing evidence that the defendants either knew that the complained of statement was false in a material way at the time of publication or that the defendants had a reckless disregard of whether it was true or false. * * *

* * *

If you decide for the plaintiff on the question of liability, you must fix the amount of money which will reasonably and fairly compensate him for the following elements of damages proved by the evidence or presumed to have resulted from the defamation complained of statement.

First, the impairment of plaintiff's personal and professional reputation and standing in the community.

Second, the personal humiliation and anguish and suffering.

Third, the value of loss of income and business opportunities.

* * *

Defamation per se is considered so obviously damaging that damages are presumed.

> * * * However, the presumption may be overcome or limited by evidence."
>
> The court also asked the jury to answer the following special interrogatories:
>
> "Do you find by clear and convincing evidence that the complained of statement was published with actual malice by the Chicago Tribune Company and Maurice Possley?
>
> * * *
>
> * * * Do you find that the following complained of statement was defamatory of Thomas Knight? 'Gorajczyk told the DuPage grand jury that Knight told him to keep his mouth shut about his conclusion and not to tell anyone that there was no written report.'"

The jury returned a verdict in favor of defendants. The jury found, by special verdict, that defendants did not defame Knight. Further, Knight failed to prove that defendants acted with actual malice.

In his motion for a new trial, Knight argued that the trial court erred in admitting evidence of prior negative publicity and in rejecting Knight's proposed instructions on damages. The trial court defended its damages instructions and the decision to permit evidence of prior negative publicity as mitigating Knight's claimed damages. The court also held that the alleged errors had no effect on the result because the jury, by special interrogatory, found no actual malice, and therefore the jury had no reason to

consider the question of damages. The court denied the motion for a new trial. Knight now appeals.

II. ANALYSIS

Again, on appeal, Knight argues that the court committed reversible error when it admitted evidence of prior negative publicity regarding the prosecution of Cruz. We will not reverse a jury verdict because of error in an evidentiary ruling unless the trial court abused its discretion and the ruling prejudiced the appellant. *Taluzek v. Illinois Central Gulf R.R. Co.*, 255 Ill.App.3d 72, 83, 193 Ill.Dec. 816, 626 N.E.2d 1367 (1993). The appellant bears the burden of establishing prejudice. *Smith v. Baker's Feed & Grain, Inc.*, 213 Ill.App.3d 950, 952, 157 Ill.Dec. 361, 572 N.E.2d 430 (1991).

Knight claims that the court's evidentiary ruling here conflicts with *Myers v. The Telegraph,* 332 Ill.App.3d 917, 924-25, 265 Ill.Dec. 830, 773 N.E.2d 192 (2002). The court in *Myers* rejected the "incremental – harm doctrine," which "bars recovery for any false and defamatory statements whose potential damaging effect is outweighed, as a matter of law, by other harmful, but true, text in the same publication." *Myers,* 332 Ill.App.3d at 924, 265 Ill.Dec. 830, 773 N.E.2d 192. Knight reads *Myers* as authority for barring any evidence of the plaintiff's reputation, whenever the plaintiff has stated a cause of action for defamation *per se.* In effect, he argues that the law entitles every such plaintiff to an irrebuttable

presumption of damages. We do not believe the holding of *Myers* reaches so far. Creating such an irrebuttable presumption, and disallowing all evidence of the plaintiff's reputation, would set Illinois law far from the law of other jurisdictions, as most states permit defendants to present, in mitigation of damages, evidence of the plaintiff's reputation before the alleged defamation. See, *e.g., Martin v. Roy,* 54 Mass.App.Ct. 642, 646, 767 N.E.2d 603, 607 (2002); *Gosden v. Louis,* 116 Ohio App.3d 195, 215-16, 687 N.E.2d 481, 494 (1996); *McBride v. New Braunfels Herald-Zeitung,* 894 S.W.2d 6, 9 (Tex.App.1994); *Williams v. District Court, Second Judicial District, City & County of Denver,* 866 P.2d 908, 911-12 (Colo.1993); *Guccione v. Hustler Magazine, Inc.,* 800 F.2d 298, 303-04 (2d Cir.1986); *Marcone v. Penthouse International Magazine for Men,* 754 F.2d 1072, 1079 (3d Cir.1985); *Gobin v. Globe Publishing Co.,* 229 Kan. 1, 5-6, 620 P.2d 1163, 1166-67 (1980).

However, we need not address the reach of the holding in *Myers.* The jury here found, by special verdict, that Knight failed to prove actual malice by clear and convincing evidence. That finding alone, apart from any finding on damages, mandated a judgment in favor of defendants. See *Wanless v. Rothballer,* 115 Ill.2d 158, 171-75, 104 Ill.Dec. 759, 503 N.E.2d 316 (1986). The negative publicity evidence had no bearing on the issue of actual malice.

Knight maintains that the negative publicity evidence so thoroughly prejudiced him that the jury could not weigh the evidence of malice impartially.

Possley, a veteran reporter, knew that he read only the grand jury transcript of Kirby's testimony. Possley never contacted Gorajczyk to verify the report of what Knight said to Gorajczyk. Possley never asked Knight about what Knight said to Gorajczyk. Possley rephrased Kirby's testimony that Knight said "not to discuss" the matter, and wrote instead that Knight told Gorajczyk to "keep his mouth shut."

In opposition to this evidence, defendants offered only the testimony of Possley and other editors about the discussion that led to the introduction into Possley's draft of the phrase, "Gorajczyk told the grand jury." Possley testified that when he accepted the change he simply forgot that he had read Kirby's testimony and Gorajczyk had not spoken to the grand jury. Possley defended his use of the phrase "keep his mouth shut" as an accurate paraphrase of Kirby's testimony. Possley and all the editors testified that when they published the article they believed in the truth of every assertion therein. They did not entertain any serious doubts about any of the statements in the article.

As authority for reversal here Knight cites *White v. Garlock Sealing Technologies, LLC,* 373 Ill.App.3d 309, 311 Ill.Dec. 570, 869 N.E.2d 244 (2007). In that case the jury returned a general verdict for the defendant, supported by a special verdict that the defendant's products did not proximately cause the plaintiff's decedent to contract asbestosis. The jury also found, by special verdict, that asbestosis proximately caused the death. In a posttrial motion the

plaintiff argued that the testimony of the defendant's expert violated discovery rules. The expert testified at trial that the decedent did not have asbestosis at all. That testimony directly conflicted with the expert's deposition testimony. The trial court found that the undisclosed opinion prejudiced the plaintiff, despite the special verdict in which the jury apparently rejected the expert's testimony, as the jury found that the decedent had asbestosis, and that disease caused his death. The trial court granted the plaintiff a new trial.

The appellate court affirmed the award of a new trial. The appellate court explained:

> "[W]e agree with the trial court's determination that [the] new opinions * * * were so potentially prejudicial that granting * * * a new trial was entirely appropriate. When, as here, a jury has heard improper evidence, a trial court always possesses the authority to award a new trial to the injured party, no matter what special findings the jury may have made. The trial court is in the best position to determine to what extent the improper evidence may have affected the decisions of the jury, including any special findings." *White,* 373 Ill.App.3d at 328-29, 311 Ill.Dec. 570, 869 N.E.2d 244.

Here the trial court found that any error did not affect the special verdict. While the negative publicity here might have affected Knight's credibility, it apparently would not affect the credibility of Possley and

the editors. Knight's testimony had no bearing on the issue of actual malice, which turned primarily on the credibility of Possley and the editors. We defer to the trial court's finding, from its superior perspective, that any evidentiary error relating to the negative publicity made no difference to the result of the trial. Because Knight has not met his burden of proving prejudice, we will not reverse the judgment on the basis of the evidence of negative publicity.

Knight contends that defense counsel's comments in closing argument require reversal. Defense counsel pointed out that the prosecution of Cruz, Hernandez and Buckley kept those men, innocent of the charges against them, in prison for years. The trial court promptly sustained Knight's objections to those comments. Usually the trial court can cure any potential error by promptly sustaining appropriate objections. See *Simmons v. Garces,* 198 Ill.2d 541, 567, 261 Ill.Dec. 471, 763 N.E.2d 720 (2002). Moreover, as the comments did not concern the issue of actual malice, we see no reason to believe that they affected the result of the trial. See *Simmons,* 198 Ill.2d at 566-67, 261 Ill.Dec. 471, 763 N.E.2d 720. Again, we find no reversible error.

The refused instructions provide grounds for Knight's third argument for reversal. The trial court has discretion to decide on jury instructions. *Dillon v. Evanston Hospital,* 199 Ill.2d 483, 505, 264 Ill.Dec. 653, 771 N.E.2d 357 (2002). The court abuses its discretion if it gives unclear or misleading instructions or if the instructions do not fairly and correctly

state the law. *Dillon,* 199 Ill.2d at 507, 264 Ill.Dec. 653, 771 N.E.2d 357. We will not reverse the judgment based on erroneous instructions unless the error prejudiced the appellant. *Schultz v. Northeast Illinois Regional Commuter R.R. Corp.,* 201 Ill.2d 260, 274, 266 Ill.Dec. 892, 775 N.E.2d 964 (2002).

Knight offered an instruction that would have informed the jury that the judge found defendants guilty of defamation *per se.* The judge refused the instruction because he had held only that Knight stated a cause of action for defamation *per se.* The judge had not usurped the jury's function of deciding whether the words had defamatory effect. See *Chapski v. Copley Press,* 92 Ill.2d 344, 352, 65 Ill.Dec. 884, 442 N.E.2d 195 (1982). The judge also refused the instruction Knight offered on past and future damages.

The challenged instructions do not relate to the finding that Knight failed to show actual malice. Because Knight's proposed instructions would not alter the dispositive finding of no malice, the alleged instructional error cannot justify reversal here. See *Beiermann v. Edwards,* 193 Ill.App.3d 968, 981, 140 Ill.Dec. 702, 550 N.E.2d 587 (1990).

Finally, Knight suggests that the law should change to permit him to prevail without clear and convincing evidence of actual malice. He acknowledges that the standards enunciated in *New York Times Co. v. Sullivan,* 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964), still bind this court. We continue

to adhere to binding precedent. Knight has preserved the issue for further review.

All of the alleged errors Knight found had no bearing on the issue of actual malice. The jury found by special interrogatory that Knight failed to prove, by clear and convincing evidence, that Possley acted with actual malice. That finding demands judgment in favor of defendants. Because the alleged errors did not affect the dispositive finding, we affirm the judgment of the trial court.

Affirmed.

NEVILLE and CAMPBELL, JJ., concur.

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS COUNTY DEPARTMENT, LAW DIVISION

THOMAS L. KNIGHT,	)	
Plaintiff,	)	
vs.	)	
THE CHICAGO TRIBUNE COMPANY, a Corporation, MAURICE POSLEY, and KEN ARMSTRONG,	)	**No. 00 L 4988**
Defendants.	)	

MEMORANDUM OPINION AND ORDER

This matter comes forth on Plaintiff's Post-Trial Motion pursuant to 735 ILCS 5/2-1202 wherein the Plaintiff is asking for a new trial. This defamation per se case was tried with a jury who rendered a verdict in favor of the Defendants, and answered two special interrogatories finding that the twenty-nine word statement complained of was not defamatory and that its publication was not with actual malice. Plaintiff, an attorney and the former prosecutor of the Nicarico murder trial, represented himself pro se, except he did have an attorney ask him questions when he testified on his own behalf. Plaintiff claimed a total of eleven errors which occurred during the trial which either alone, or in combination, were such as to deprive the Plaintiff of a fair trial resulting in a

jury verdict against the manifest weight of the evidence.

In considering a motion for a new trial, the Court may set aside the verdict and order a new trial if the verdict is contrary to the manifest weight of the evidence, which occurs only "where the opposite conclusion is clearly evidence or where the findings of the jury are unreasonable, arbitrary, and not based upon any of the evidence." *Snelson v. Kamm,* 204 Ill.2d 1, 787 N.E.2d 796, 815 (2003); *Maple v. Gustafson,* 512 Ill.2d 445, 603 N.E. 2d 508 (1992); *Velarde v. Illinois Central R.R.,* 354 Ill.App.3d 523, 820 N.E.2d 37, 52 (1st Dist. 2004).

Plaintiff first complains that the Court erroneously allowed the introduction of negative publicity evidence which portrayed Plaintiff in an extremely negative light. Those items of evidence included excerpts from a Los Angeles Times story, an Arts and Entertainment television story, a Chicago Sun-Times story, and testimony about a 60-Minutes television story.

In support of his claim, Plaintiff suggests that *Myers v. The Telegraph,* 332 Ill. App.3d 917, 773 N.E.2d 192 (5th Dist. 2002) bars such evidence under the incremental harm defense which Illinois declines to adopt.

The incremental harm defense protects defamation defendants who make unflattering and false statements when the trier of fact determines that the false statements did no greater harm to the

Plaintiff's reputation than telling the truth would have done. It is used as an absolute bar to defeat a defamation action.

In the *Myers* case, a convicted criminal and his wife brought, amongst their claims, one for defamation per se against a reporter and a newspaper which reported that the criminal had pled guilty to a felony, rather than a misdemeanor, and was placed on probation, rather than conditional discharge. The rationale in the *Myers* case was that if such evidence was allowed in that case it would cause collateral issues.

In a defamation per se case, there is a presumption of damages, *Bloomfield v. Retail Credit Co.*, 14 Ill.App.3d 158, 302 N.E.2d 88 (1973). However, that presumption is rebuttable. The Plaintiff in any defamation action puts his reputation directly in issue and evidence on that subject is admissible on the question of damages. As a matter of pleading under older proceedings, this accounted for the right of the defendant to produce such reputation evidence under a general denial, as it was not a matter of affirmative defense. *McCarty v. People* (1869), 51 Ill. 231; *Iles v. Inter-Ocean Newspaper Co.*, 184 Ill. App. 63.

In the case at bar, the Defendants did not argue the incremental harm defense, and the Court did not consider the incremental harm defense. The trial court allowed only a limited portion of the Defendants' bad reputation evidence, and allowed

that evidence only for the limited purpose of alleged prosecutorial misconduct that pertained solely to the boot expert so that there would be no collateral issues. The evidence offered concerning other media evidence was received for the sole purpose to rebut Plaintiff's claim of presumed damages. (T. p. 69) In addition, the trial court, submitted limiting instructions to the jury so that they would know that the evidence was offered for a limited purpose concerning the issue of reputation and had nothing whatsoever to do with whether it was true. The parties were given the opportunity to tender to the Court any limiting instructions that they desired, but the Plaintiff offered none and accepted the Court's instruction limiting the evidence to the issue of damages only. Each time such evidence was offered, the Court provided to the jury a "limining" instruction stating:

> "Again, ladies and gentlemen, this is not offered for the truth of the matter, it's offered only as reputation." (R-2468-2471).

In addition, and most importantly, the Plaintiff failed to object to some of the evidence at the time it was offered. Objections were made *in limine* and in sidebar conferences, but not specifically to the evidence as it was introduced to the jury. (R-2281-2; 2466-69; 2470-3).

Plaintiff argued at trial that no Illinois court has allowed reputation evidence to rebut the presumption of damages in a defamation per se action and is

basically restating that claim in his motion for a new trial. Although *Cooper v. Illinois Publishing & Printing Co.,* 218 Ill. App. 95 (1920) is pre-1935, and may have no precedential value because of its age and the fact that it predated *New York Times v. Sullivan,* 376 U.S. 286, 84 S. Ct. 729, it does illustrate from an evidentiary standpoint reputation evidence has always been allowed for the purpose of mitigation of damages. A plaintiff in a defamation action puts their reputation directly in issue and evidence on that subject is admissible on the question of damages. Evidence of the plaintiff's character may also be relevant on the issue of truth of falsity of the defamation matter. The plaintiff is necessarily charged with the responsibility of defending his character, or at least his reputation, when he complains that his reputation has been damaged. The degree to which it has been damaged depends on what kind of reputation he enjoyed before the publishing of the defamatory matter. It follows, therefore, that the defendant may introduce evidence of plaintiff's bad reputation regardless of whether plaintiff had first attempted to show that it was good.

In defamation per se cases, where there is a presumption of damages, and the plaintiff has not offered any evidence one way or the other, the defendants still have the right to put on evidence of the plaintiff's reputation. However, this type of evidence would not be relevant where it shows the defendant's justification for printing the defamatory matter. Certainly, rumors or reports or information

that came from others is not relevant to show the defendant's justification. *Cobbs v. Chicago Defender,* 308 Ill. App. 55, 31 N.E.2d 323 (1941); *O'Malley v. Illinois Publishing & Printing Co.,* 194 III. App. 544 (1965); *Sheahan v. Collins,* 20 Ill. 325 (1858). In the case at bar, the evidence was used only to mitigate damages, not for justification. In fact, in mitigation of damages, the defendant may show the general past character of the plaintiff before and at the time of the publication of the defamatory statement. Otherwise, the plaintiff's reputation, albeit of good character, is conclusively presumed, and that does not occur under a rebuttable presumption. *Ranson v. McCurley,* 140 Ill. 626, 31 N.E. 119 (1892). 15 Am. Jur. 2d Libel and Slander, §§ 469, 476, 477, 478. Jones on Evidence, 6th ed. § 4.35, Illinois Evidence Manual (Third), by Steigmann, § 4.18. In *Cooper,* the court held:

> "We are of the opinion that the defendant was entitled, in mitigation of damages, to put in evidence tending to show that the reputation of the plaintiff in the trial of sex cases prior to the time in question had been diminished. Such evidence would not be competent on the issue of truth of the alleged libelous words but it was competent to show that the publication in question was not the sole case of the impairment of the reputation of the plaintiff as a judicial officer in the trial of sex cases . . . Any evidence of his reputation in sex cases, as it existed prior to (the date of publication), might tend to mitigate the damages claimed, and should have been admitted."

In addition, other jurisdictions have addressed this issue. In *Williams v. District Court,* 2d Judicial Dist., 866 P.2d 908, Colo. (1993), the court in addressing the relevance of reputation evidence to rebut damages in a libel case, stated:

> "While damages are presumed, and need not be proven, in the cases involving defamation per se, the jury must still consider any actual impairment to the plaintiff's reputation in determining the amount of damages. Moreover, a defendant in a defamation action may present any evidence which tends to mitigate damages. Such evidence can include any publications by third persons dealing with the same subject, made before or about the same time as the date of the publishing by defendant."

See similar rulings in other jurisdictions. *Guccione v. Hustler Magazine, Inc.,* 800 F. 2d 298 (2d Cir. 1986); *Wynberg v. National Enquirer, Inc.,* 564 F. Supp. 924 (CD. Cal. 1982); *McDonald v. Time, Inc.,* 554 F. Supp. 1053 (D.N.J. 1983); *Warren v. Pulitzer Pub. Co.,* 78 SW 2d 404 (Mo. 1934); *Hartman v. American News Co.,* 171 F. 2d 581, 586 (7th Cir. 1948); *Sharon v. Time, Inc.,* 103 FRD 86, 90 (S.D. N.Y. 1984); *Sharon v. Time, Inc.,* 609 F. Supp. 1291, 1297 (S.D. N.Y. 1987; *Marcone v. Penthouse Int'l. Mag. For Men,* 754 F. 2d 1072 (3rd Cir. *cert. denied,* 474 U.S. 864 (1985); *Schiavone v. Time, Inc.,* 847 F. 2d 1069 (3d Cir. 1988). The pertinent part of the article stated:

> "As the trial approached, lead prosecutor Tomas Knight summoned John Gorajczk a shoe print examiner in the sheriffs police crime lab, to discuss his examination of Buckley's boots according to the grand jury transcripts. Earlier, Gorajczk had compared Buckley's boots to the print on the Nicarico door and concluded they didn't match. He did not write any report about his findings." (R-651).

Plaintiff complains that the next twenty-nine words were incorrect and constituted defamation per se:

> "Gorajczk told the DuPage Grand Jury that Knight told him to keep his mouth shut about his conclusion and not to tell anyone that there was no written report."

The Tribune knew that Gorajczk never testified before the grand jury that he was interviewed by an investigator who testified and Gorajczk told the investigator that Knight told him not to discuss his findings with anyone.

The article then stated:

> "Knight then sent the print and boots to the Illinois State Police Crime Lab, where an examiner said he could not conclusively say if the boot matched or not. So Knight sent the boots and prints to an expert in Kansas who also said he could reach no conclusion.
>
> Eventually Knight settled on Louise Robbins, a shoe expert who not only said

> Buckley's boots matched the door print, but that she could look at a shoe print and tell the height and race of the wearer. Such claims, as well as Robbins's reputation as a shoe print expert, were debunked, but not until years later."

Plaintiff argued that the twenty-nine words were defamation per se in the context of the article because the article infers that Knight who was seeking a death penalty would hide a negative opinion and then go out and find someone to give a positive opinion to convict someone for murder. (R-657)

The Plaintiff also argues that the Defendants abused the Court's ruling as to the other negative publicity evidence and that this prejudiced the Plaintiff The trial court ruled that only such evidence relating to the Gorajczk statement or the boot print issue would be permitted.

The Court attempted to minimize any collateral issues and tried to keep collateral issues out of the case. The Court requested the attorneys to review the audio and other exhibits together to insure the Court that there would be no expansion of the Court's rulings. (T. 2466). However, during the evidentiary phase of the case, and in closing arguments, the Defendants concluded in the A&E Television Exhibit, a description of the Plaintiff as "the Black Knight." However, Plaintiff failed to object after reviewing this exhibit, failed to object at the time it was placed into evidence and in closing arguments, but now objects to

its use after receiving a jury verdict in favor of the Defendants.

The failure to object normally is considered as a waiver of the objection. *Pharr v. Chicago Transit Authority,* 220 Ill.App.3d 509, 515, 581 N.E.2d 162 (1st Dist. 1991). In addition, Plaintiff argues that during closing arguments, the Defendants argued the subjective truth of the other negative publicity evidence, including comments to the effect that because of Plaintiff's conduct, Buckley, an innocent man, spent several years in prison. An objection to this argument was sustained and the trial court stated to the jury (T. 3234):

> "Your objection is sustained, and the jury will decide the case based on the evidence you heard and the law that I give you and nothing else."

In addition, the information was placed into evidence by the Plaintiff himself during his questioning of Defendant Possley (T. 853) concerning one of the early drafts of the article which was the subject matter of this case. (Plaintiff's Ex. 5-1, January 12, 1999).

A party cannot complaint when he interjects an argument into the proceedings which invites rebuttal from opposing counsel. *Jarmon v. Jinks,* 165 Ill.App.3d 855, 520 N.E.2d 788 (1987). It was Plaintiff who first raised the issue of his conduct leading to the sentencing of an innocent man to prison when he introduced into evidence Plaintiff's Exhibit No. 1,

"Prosecution on Trial in DuPage" article, and distributed a copy of the article to each member of the jury at the beginning of his direct examination of Defendant Possley (T. pp. 797-798). In fact, Plaintiff was admonished about what would happen if the article was utilized in its entirety concerning the information of the time that Cruz, Buckley and Hernandez spent in prison at the time of the motions in limine. (T. 40:12-43:24).

Plaintiff was advised at that point in time that it was dangerous to give that type of information to the jury and expect them to disregard it, even though it was being used for another purpose. At that point in time, the Plaintiff did not ask for a limiting instruction nor did he ask for a limiting instruction at the time the exhibit was introduced into evidence. If any doors were opened, it was the Plaintiff who did so.

The Plaintiff argues that the court erroneously allowed the Defendants to introduce portions of his law firm's website that illustrated several settlements and jury awards obtained by Plaintiff to refute or mitigate his damages. Plaintiff claims that this information caused him prejudice. He objected on the grounds of relevance. (T. 2368-2370) and cannot cite *any* authority for his theory that in a defamation per se case, a defendant cannot submit evidence to refute or mitigate the presumption of damages. The Plaintiff did not present any evidence of loss of income or any other damages, and relied solely on the presumption. The defense showed that during the period in

question, Plaintiff was obtaining large verdicts and settlements in medical malpractice cases. Plaintiff refused to submit to discovery concerning his earnings during the period in question. His website was displayed publicly on the internet to tell the public about himself and his law firm. (T. 2368).

The case law previously cited supports the trial court's position. However, most importantly, error in the admission of evidence does not require a new trial where there has been no substantial prejudice or where the evidence has not materially affected the result. *Pantaleo v. Our Lady of Resurrection Medical Center,* 297 Ill.App.3d 266, 96 N.E.2d 717 (1st Dist. 1998); *Ford v. City of Chicago,* 132 Ill.App.3d 408, 476 N.E.2d 1232 (1st Dist. 1985).

The special interrogatories answered by the jury demonstrated that the jury did not find malice in this case and also did not find the article to be defamatory, and therefore, did not consider the question of damages. The Plaintiff adequately responded to the Defendants' evidence by illustrating that the verdicts and settlements did not demonstrate what monies he received or fees, or even if there were fees ever paid during that period of time.

Plaintiff further argues that the Defendants' counsel further aggravated the prejudice of the improperly admitted website settlement and award evidence in closing argument when he appealed to the prejudice of the jury by derogatorily referring to the Plaintiff as being amongst the rich and powerful

who, in effect, seeks special treatment from the justice system. That comment, either alone or together with the improper evidence which provided the jury with a misleading impression of the Plaintiff's income served to deny the Plaintiff a fair trial from the jury is what the Plaintiff has argued.

The Plaintiff also argues that the trial court admonished the parties not to interrupt each other with objections during closing argument. It is true that the trial court did suggest to both lawyers prior to closing arguments that when the Plaintiff presents his closing argument, the Defendant would have the opportunity in his argument to tell the jury all of the incorrect statements or arguments of the Plaintiff, and unless those statements were prejudicial objections as to what the evidence was would be nonproductive. The Court further said that the Plaintiff would have the same opportunity during his closing argument and that "hell should not break out until the Plaintiff's rebuttal arguments."

When the trial court reviewed the trial record, it was found that Plaintiff objected three times during Defendants' closing argument so any claim that he refrained from objecting is certainly misplaced. (R-3234; 3239; 3241).

This was a hard fought trial. All of the lawyers were experienced attorneys who excelled and enjoyed their work. The case was replete with objections and sidebar conferences, and the trial took weeks to be completed. The trial court observed that the jury was

anxious and restless and suggested to the attorneys that sidebars during closings are non-productive, but also stated that objections should be made if comments were prejudicial or the record needed to be preserved.

The defense stated in their closing argument:

> "Defamation cases are designed to stop speech. And rich and powerful people like the prosecutor – now – turned plaintiff's lawyer, Mr. Knight, don't want people reporting about their activities and they use these kind of cases to do that. They use these kind of cases to stop speech." (T. 3224: 23-3225:4).

Plaintiff did not make a contemporaneous objection during the closing argument of the defense as to this matter, and as a result, the objection is waived. *Pharr, supra*. However, if a litigant fails to object, and if those prejudicial statements prevent a fair trial, the trial court has a duty to grant a post-trial motion for a new trial.

In this case, Plaintiff in his rebuttal argument more than adequately addressed Defendants' arguments, and his statements, and the evidence of the awards and settlements from the website. The trial court cannot say that Defendants' statements were so inflammatory or prejudicial to have denied the Plaintiff a fair trial.

The Plaintiff argues that the Court improperly refused his jury instruction No. 8 which was not an IPI instruction, which stated:

"If you decide for the plaintiff on the question of liability, you must fix the amount of money which will reasonably and fairly compensate him for the following elements of damages:

1. Past and future injury;
2. Professional and personal reputation;
3. Past and future humiliation, embarrassment, anxiety and fear; and
4. Past and future loss of income and business opportunity.

It is presumed as a matter of law that damage to the plaintiff's reputation, emotional state and ability to earn income or obtain business resulted from the defamatory statement published by the defendants. You, however, must determine the amount of money to be awarded for that damage, taking into account the nature of the defamatory statement and the extent of the publication."

The Court refused the instruction because it referred to past and future damages (T. 3060), and the wording directs the jury to provide a verdict for Plaintiff in monetary damages which improperly states the law. In addition, the instruction further was inaccurate as a matter of law. The Court allowed the following instructions in lieu of Plaintiff's instruction No. 8, to-wit:

"If you decide for the plaintiff on the question of liability, you must fix the amount of money which will reasonably and fairly compensate

him for the following elements of damages proved by the evidence or presumed to have resulted from the defamatory complained of statement:

1. Impairment of plaintiffs personal and professional reputation and standing in the community;
2. Personal humiliation, and anguish and suffering;
3. The value of loss of income and business opportunities;
4. The amount, if any, of these damages is for you to determine."

The Court then allowed the following instruction:

"Defamation per se is considered so obviously damaging that damages are presumed."

The Court then allowed he following instruction to complete the phase of the damage instruction, to-wit:

"The law presumes that damage to a person's reputation, emotional state, inability to earn income or obtain business occurs as a result of the publication of a defamatory statement. However, the presumption may be overcome or limited by evidence."

The Plaintiff next argues that the trial court improperly refused Plaintiff's instruction No. 7 that the Court had determined that the statement in the

Tribune article was defamatory per se. The instruction stated:

> "The court has found that the statement published by the defendants which is at issue in this case was defamatory per se, so that is not an issue you will need to decide. You should not concern yourself with that issue or the reasons for the court's decision."

The trial court never found that the statement was defamatory per se. Plaintiff does not cite an order or transcript of such a finding. It was understood by the parties prior and during the trial that if the jury found that the statement was defamatory, this would be a defamatory per se case.

Where the harmful nature of an alleged defamatory statement is not obvious on its face but would require context and/or knowledge of extrinsic facts to have a defamatory meaning, the statement does not fall into the defamation per se classification automatically. See *Lowe Excavating v. Int'l. Union,* 327 Ill.App.3d 711, 765 N.E.2d 21 (2nd Dist. 2002).

Throughout the trial, Plaintiff repeatedly argued to the Court and urged the jury to consider the context of the article and the series as a whole in to order to find it defamatory. For example, the following colloquy occurred during the conference on instructions:

> Mr. Knight: The – as a whole. The article as a whole.
>
> The Court: I mean, isn't that what you're trying to do here?
>
> Mr. Knight: Well, I'm trying to figure how similar it is. It's a context – it also includes the series, of course, How Prosecutors Sacrifice Justice to Win, but I think – I can live with that.
>
> Ms. Hamilton: I mean, and that's my point. To the extent that he has to put this in context, these words that are at issue, the 29. words, into context, and the extraneous facts and everything else that comes in around it in the article, he has automatically taken those 29 words out of the defamatory per se category. And they can't possibly be defamatory per se as a matter of law.
>
> Mr. Knight: Different issues.

In fact, Plaintiff survived the summary judgment motion during pre-trial procedures urging the Court to consider the context of the article and the series as a whole in its determination as whether the article could be defamatory. However, the jury decided the case based on the lack of actual malice, and a special interrogatory disclosed that the jury found the statement was also not defamatory. However, even if the Court had allowed the per se instruction to go to the jury, the jury still found lack of malice and the result would have been the same.

In addition in Plaintiff's opening statement he stated:

> "So that's issue number one that you are going to be dealing with, is this defamation per se. The Judge does not actually instruct you on that issue, you decide it." (R-657).

The Plaintiff next argues that the Court improperly submitted to the jury a special interrogatory requiring it to decide whether the Gorajczk statement in the article was defamatory. Defendant submitted two special interrogatories. The first special interrogatory asked the jury to determine whether the conduct of the Defendants was done with actual malice, and the second special interrogatory asked the jury to determine whether the statement complained of was defamatory. Plaintiff argues that since the issue of the alleged defamation was already found to be per se by the Court, the special interrogatory confused the issues for the jury.

Recently, the Supreme Court of Illinois stated that a special interrogatory is proper if: (1) it relates to an ultimate issue of fact upon which the rights of the parties depend, and (2) an answer responsive thereto is inconsistent with the general verdict that might be returned." *Glen Blue v. Environmental Engineering, Inc.*, 215 Ill.2d 78, 112 (2005). It is not disputed this special interrogatory relates to the ultimate issue, whether the statement complained of was defamatory. In addition, the Plaintiff does not dispute that the answer to the special interrogatory

could have been inconsistent with the general verdict. In addition, Plaintiff does not explain his theory as to how the jury would be confused.

The Plaintiff next argues that the jury's determination that the Gorajczk statement was not defamatory is against the manifest weight of the evidence because the Court has already determined as a matter of law that it was defamatory per se. This argument has already been explained in this memorandum and opinion.

The Plaintiff had stated time and time again that he believed that if the United Stases Supreme Court had a defamation per se case today, they would decide that the standard of proof for actual malice would not be the present law of "clear and convincing evidence," but would be "preponderance."

In *Costello v. Capital Cities Communication, Inc.*, 120 Ill.2d 402 (1988), the Supreme Court of Illinois stated that the plaintiff must prove actual malice by "clear and convincing evidence." Plaintiff also argues that the definition for "reckless disregard" for the purpose of the actual malice should be changed to mean: "The defendant engaged in a highly unreasonable conduct constituting an extreme departure from the standards of investigation and reporting ordinarily adhered to by responsible publishers." This argument is made by Plaintiff to preserve the matter for the United States Supreme Court knowing that it is not now the existing law.

Lastly, the Plaintiff claims the Court erred in directing the verdict in favor of the Defendant, Kenneth Armstrong, at the close of the Plaintiff's evidence. The trial court found that there was no evidence that reporter Kenneth Armstrong had done anything in furtherance of the twenty-nine words that Plaintiff complained of in the subject article, or that his conduct in investigating the events that were the subject matter of the article constituted actual malice. Since he had nothing to do with the writing of that portion of the article or its publication concerning those words, the Court had no other alternative but to dismiss him as a defendant in the case.

The Plaintiff claims that he argued extensively, in response to Armstrong's motion for summary judgment and at trial, that there was sufficient evidence for the jury to find Armstrong was vicariously liable for Defendant Possley's conduct; however, Plaintiff's response to the motion for summary judgment is not attached nor made part of this motion for a new trial, nor does he cite to a transcript to show his arguments. The trial court was not the judge who heard the motion for summary judgment, was not aware of any of his arguments.

Further, the amended complaint claims that both Armstrong and Possley are "agents and employees" of the Defendant Chicago Tribune (Am. Compl. No. 2). There are no allegations of an agency relationship between Possley and Armstrong, and Plaintiff's motion for a new trial is devoid of factual allegations

concerning agency, and the Court could find no such agency between the two reporters whatsoever.

Armstrong's only real relationship to the twenty-nine word statement was the fact that he proposed to his editor that the paper prepare a series to "put prosecutors on trial" and that he wrote a portion of the series with Possley, but had nothing to do with the twenty-nine words complained of.

In conclusion, this Court finds no legal basis or reasons to grant Plaintiff a new trial.

IT IS HEREBY ORDERED that Plaintiff's Motion for a New Trial is denied.

ENTERED:

JUDGE ROBERT E. GORDON

/s/ [Illegible]

FEB 23 2006

Judge Robert E. Gordon

DATED: _____

IN THE CIRCUIT COURT OF COOK COUNTY
COUNTY DEPARTMENT,
FIRST MUNICIPAL DISTRICT

THOMAS L. KNIGHT	)	
Plaintiff(s),	)	
	)	
v.	)	No. 00 L 4988
CHICAGO TRIBUNE AND MAURICE POSSLEY	)	
	)	
Defendant(s).	)	

ORDER

This cause coming forth for a jury trial, the jury having rendered a verdict in favor of the defendant(s) Chicago Tribune and Maurice Possley v plaintiff~~(s)~~ Thomas L. Knight

IT IS HEREBY ORDERED THAT judgment is entered on the verdict in favor of defendant(s) Chicago Tribune and Maurice Possley against plaintiff~~(s)~~ Thomas L. Knight plus costs

ENTER:

JUDGE ROBERT E. GORDON
/s/ [Illegible]
May 20, 2005
ROBERT E. GORDON, JUDGE
JUDGE'S #1687

Attorney Number: 06347
Attorney Name: Patrick Morris,
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Attorney for: Defendants
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107399

SUPREME COURT OF ILLINOIS
CLERK OF THE COURT
SUPREME COURT BUILDING
SPRINGFIELD, ILLINOIS 62701
(217) 782-2035

January 28, 2009

Mr. William L. Browers
Attorney at Law
4170 N. Marine Drive
Chicago, IL 60613

No. 107399 – Thomas L. Knight, petitioner v. Chicago Tribune Company, etc., et al., respondents. Leave to appeal, Appellate Court, First District.

The Supreme Court today DENIED the petition for leave to appeal in the above entitled cause.

The mandate of this Court will issue to the Appellate Court on March 4, 2009.

VERDICT FORM B

We, the jury, find for the Defendants, Chicago Tribune Company and Maurice Possley and against Plaintiff, Thomas L. Knight.

/s/ Daniel McTalley Foreperson	/s/ [Illegible]
/s/ [Illegible]	/s/ Stephanie Lee
/s/ AJ Oliver	/s/ M. Watkins
/s/ Dorothy Williams	/s/ Eric Eciley
/s/ [Illegible]	/s/ [Illegible]
/s/ Sharmila H. Mims	/s/ Jennifer Kemall

SPECIAL INTERROGATORY #1

Do you find by clear and convincing evidence that the Complained of Statement was published with actual malice by Chicago Tribune Company and Maurice Possley?

"Clear and convincing evidence" has been defined as that measure or degree of proof that produces a firm belief or conviction that the proposition of actual malice is true.

Plaintiff must prove by clear and convincing evidence that the Defendants Published the

Complained of Statement with actual malice, which means that the Defendants either knew that the Complained of Statement was false when published or permitted it to be published with a reckless disregard of the truth, that is they in fact entertained serious doubt as to the truth or had a high degree of awareness of probable falsity.

Answer "Yes" or "No.".

Answer: _____ Yes ___X___ No

/s/ Daniel McTalley Foreperson

/s/ Dorothy Williams

/s/ Jennifer Kemall

/s/ AJ Oliver

/s/ [Illegible]

/s/ M. Watkins

/s/ [Illegible]

/s/ [Illegible]

/s/ [Illegible]

/s/ Sharmila H. Mims

/s/ Stephanie Lee

/s/ Eric Eciley

Special Interrogatory #2

Do you find that the following Complained of Statement was defamatory of Thomas Knight?

> "Gorajczyk told the DuPage grand jury that Knight told him to keep his mouth shut

about his conclusion and not to tell anyone that there was no written report."

A statement is defamatory if it is false in material way, and if it tends to cause such harm to the reputation of the Plaintiff that it lowers that person in the eyes of the community or deters third persons from associating with him.

Answer: "Yes" or "No"

Answer: ____ Yes __X__ No

/s/ Daniel McTalley _____ /s/ [Illegible] _____
Foreperson

/s/ [Illegible] _____ /s/ Stephanie Lee _____

/s/ AJ Oliver _____ /s/ M. Watkins _____

/s/ Dorothy Williams _____ /s/ [Illegible] _____

/s/ [Illegible] _____ /s/ Jennifer Kemall _____

/s/ Sharmila H. Mims _____ /s/ Eric Eciley _____

Special Interrogatory #3

Do you find that the Complained of Statement was false in a material way?

Answer: "Yes" or "No"

Answer: __X__ Yes ____ No

/s/ Daniel McTalley Foreperson	/s/ [Illegible]
/s/ [Illegible]	/s/ Stephanie Lee
/s/ AJ Oliver	/s/ M. Watkins
/s/ [Illegible]	/s/ Sharmila H. Mims
/s/ Dorothy Williams	/s/ [Illegible]
/s/ Jennifer Kemall	/s/ Eric Eciley
/s/ Sharmila H. Mims	/s/ Eric Eciley

JURY INSTRUCTIONS

The Court has found that the statement published by the defendants which is at issue in this case was defamatory per se, so that not an issue you will need to decide. You should not concern yourselves with that issue or the reasons for the Court's decision.

Plaintiff's Instruction Number: IPI 1.02 modified

[2nd sentence added]

Costello v. Capital Cities Communications, Inc., 125 Ill.2d 402, 414, 532 N.E.2d 790, 795 (1988)

When I say that a party has the burden of proof on any proposition, or use the expression "if you find," or "if you decide," I mean you must be persuaded, considering all the evidence in the case, that the proposition on which he has the burden of proof is more probably true than not true.

IPI 21.01

The plaintiff has the burden of proving each of the following propositions:

First, that the statement published by the defendants was false; and

Second, that when the defendants published that statement, they either knew that the statement was false, or published it with a reckless disregard for whether the statement was true or not, meaning that

they engaged in highly unreasonable conduct constituting an extreme departure from standards of investigation and reporting ordinarily adhered to by responsible publishers.

If you find from your consideration of all the evidence that each of these propositions has been proved, then your verdict should be for the plaintiff On the other hand, if you find from your consideration of all the evidence that any of these propositions has not been proved, then your verdict should be for the defendants.

IPI 21.02 modified

Curtis Publishing Company v. Butts, 388 U.S. 130, 155 (1975)

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(2)

Supreme Court, U.S.
FILED
JUL 31 2009
OFFICE OF THE CLERK

No. 08-1337

IN THE

Supreme Court of the United States

THOMAS L. KNIGHT,
Petitioner,

v.

CHICAGO TRIBUNE COMPANY, a corporation,
MAURICE POSSLEY and KEN ARMSTRONG,
Respondents.

On Petition for a Writ of Certiorari to the Appellate Court of Illinois

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Court should grant the petition for writ of certiorari even though: (a) that petition was filed in violation of the automatic stay imposed due to Respondent Chicago Tribune Company's bankruptcy petition; (b) Petitioner has failed to seek relief from the automatic stay; and (c) the automatic stay extends to Respondents Maurice Possley and Ken Armstrong because Respondent Chicago Tribune Company is the real party in interest?

2. Whether the Court should overturn almost half a century of settled jurisprudence and overrule *New York Times v. Sullivan* despite the fact that there are independent and adequate state grounds to affirm?

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, Respondent Chicago Tribune Company states that its parent company is Tribune Company. Tribune Company, a publicly-traded company, owns more than 10% of Chicago Tribune Company's stock.

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Rodney A. Smolla, Law of Defamation 2:1, 3 (2d ed. 2009) 7

IN THE

Supreme Court of the United States

No. 08-1337

THOMAS L. KNIGHT,
Petitioner,

v.

CHICAGO TRIBUNE COMPANY, a corporation,
MAURICE POSSLEY and KEN ARMSTRONG,
Respondents.

On Petition for a Writ of Certiorari to the Appellate Court of Illinois

BRIEF FOR THE RESPONDENTS IN OPPOSITION

STATEMENT OF THE CASE

In this defamation case, Petitioner Thomas L. Knight sued Respondent Chicago Tribune Company and two of its reporters, Respondents Maurice Possley and Ken Armstrong, for allegedly publishing defamatory statements about him. App. 4, 7. Following a trial, the jury answered special interrogatories finding that the challenged statements were not defamatory and that Petitioner (then Plaintiff) failed to prove actual malice. App. 34, 48-50.

On appeal, the Illinois Court of Appeals considered three points of error raised by Petitioner, all of which are based on Illinois evidence or procedural law.

App. 2, 16-22. On those issues, the Court of Appeals held (1) that any error in admitting evidence of prior negative publicity was not reversible error; (2) comments by counsel for the newspaper and reporters during closing argument that the prosecutor kept innocent men in prison for years did not require reversal; and (3) any error in refusing to give certain jury instructions proposed by Petitioner was not reversible error. *Knight v. Chicago Tribune Co.*, 385 Ill.App.3d 347, 358 (Ill. App. Ct. 2008); App. 16-22.

On December 8, 2008, Respondent Chicago Tribune Company filed a voluntary petition for relief under chapter 11 of the Bankruptcy Code in the United States Bankruptcy Court for the District of Delaware. Respondent Chicago Tribune Company's chapter 11 case number is 08-13152. Respondent's chapter 11 case has been administratively consolidated with that of its parent company, Tribune Company, under case number 08-13141, and is pending before Chief United States Bankruptcy Judge Kevin J. Carey.

On January 28, 2009, the Supreme Court of Illinois denied Petitioner's request for leave to file an appeal. App. 47.

ARGUMENT

I. THE PETITION FOR CERTIORARI SHOULD BE DENIED BECAUSE IT WAS FILED IN VIOLATION OF THE AUTOMATIC STAY.

A. The Petition for Certiorari is Void as to Chicago Tribune Company Because it was Filed in Violation of the Automatic Stay.

The automatic stay of section 362(a) of the Bankruptcy Code operates as an injunction prohibit-

ing, in relevant part, " . . . the continuation. . . of any judicial, administrative, or other action or proceeding against the debtor . . . " and "any act to obtain possession of property of the estate or to exercise control over property of the estate." 11 U.S.C. § 362(a)(1), (3). The prevailing rule, including in the Third Circuit where Respondent's chapter 11 case is pending, is that actions taken in violation of the automatic stay, including judicial proceedings, are void ab initio, and without legal effect. *See, e.g.*, *Soares v. Brockton Credit Union* (*In re Soares*), 107 F.3d 969, 976 (1st Cir. 1997); *In re Siciliano*, 13 F.3d 748, 750 (3d Cir. 1994); *In re Schwartz*, 954 F.2d 569, 571 (9th Cir. 1992); *Job v. Calder* (*In re Calder*), 907 F.2d 953, 956 (10th Cir. 1990) (*per curiam*); 48th St. *Steakhouse, Inc. v. Rockefeller Group, Inc.* (*In re 48 St. Steakhouse, Inc.*), 835 F.2d 427, 431 (2d Cir. 1987); *Albany Partners, Ltd. v. Westbrook* (*In re Albany Partners, Ltd.*), 749 F.2d 670, 675 (11th Cir. 1984). This doctrine stems from the Supreme Court decision in *Kalb v. Feuerstein*, 308 U.S. 433 (1940), in which the Court held that the state court's order of a real property foreclosure was "beyond its power, void, and subject to collateral attack", in light of the debtor's petition for relief under the prior Bankruptcy Act.

The minority view is that unauthorized post-petition proceedings are merely "voidable," but the distinction is largely a semantic one. *See Easley v. Pettibone Mich. Corp.*, 990 F.2d 905, 910-11 (6th Cir. 1993) ("If we are to give effect to the statutory authority to annul a stay, such actions can only be described as invalid and voidable, since void actions are incapable of later cure or validation."). *See also Jones v. Garcia* (*In re Jones*), 63 F.3d 411, 412 and

n.3 (5th Cir. 1995); *Bronson v. United States*, 46 F.3d 1573, 1578 (Fed. Cir. 1995).

This distinction is not relevant here because Petitioner took no action to seek relief from the automatic stay from the Bankruptcy Court prior to filing his petition for certiorari, nor has he taken any action to validate or ratify his violation of the automatic stay, *i.e.*, by seeking an annulment of the automatic stay from the Bankruptcy Court. The petition for certiorari was filed in violation of the automatic stay of 11 U.S.C. § 362(a) applicable to Respondent Chicago Tribune Company and is therefore void and without effect. For the foregoing reasons, Respondent Chicago Tribune Company respectfully requests that this Court deny the petition.

B. The Automatic Stay Should Be Extended to Respondents Possley and Armstrong because Chicago Tribune Company is the Real Party in Interest.

As a general rule, the automatic stay of section 362(a) only applies to debtors and does not apply to actions against non-debtor parties. The purposes of the stay, to protect the debtor from harassment and to preserve the property of the estate to permit orderly distribution, are not typically implicated by proceedings against a non-debtor. Thus, a lawsuit brought initially against multiple defendants, including the debtor, may still proceed against the non-debtor co-defendants after the debtor files bankruptcy. *See, e.g., Lynch v. Johns-Manville Sales Corp.*, 710 F.2d 1194, 1196 (6th Cir. 1983) (refusing to extend the stay to co-defendant corporations in asbestos lawsuits, stating that the stay is not ordinarily extended to "entities such as sureties, guaran-

tors, co-obligors, or others with a similar legal or factual nexus to the chapter 11 debtor").

However, in *A.H. Robins Co. v. Piccinin*, 788 F.2d 994, 999 (4th Cir. 1986), the Fourth Circuit created an exception to the general rule, permitting an extension of the automatic stay to non-debtors when, among other things, "there is such identity between the debtor and the third-party defendant that the debtor may be said to be the real party defendant and that a judgment against the third-party defendant will in effect be a judgment against the debtor." Several courts have agreed that an "identity of interest" is shown when the debtor's employee or principal in entitled to indemnity, because a judgment against the non-debtor defendant will directly affect the debtor's assets. *See, e.g., In re Continental Airlines*, 177 B.R. 475, 481 (D. Del. 1993) (holding that bankruptcy court had authority to extend automatic stay to shareholders' class action lawsuits against directors and officers of debtor); *In re North Star Contracting Corp.*, 125 B.R. 368, 370-71 (S.D.N.Y. 1991) (holding that state court action by former employee against debtor's president violated automatic stay); *In re Lomas*, 117 B.R. 64, 68 (S.D.N.Y. 1990) (holding that creditor's suit against debtor's officers was properly stayed).

In this case, such an identity of interest exists between Respondent Chicago Tribune Company and the individual respondents. The individual respondents are each current or former employees of Chicago Tribune Company and were acting within the scope of their employment in reporting and publishing the alleged defamatory statements at issue in this case. App. 4. Respondent Chicago Tribune Company provides its present and former

directors, officers, employees, and agents with broad indemnity against liability and loss suffered and expenses (including attorneys' fees) incurred in connection with any threatened, pending, or completed action, suit, or proceeding, by reason of the fact that such persons are or were serving as a director, officer, employee, or agent of the company.[1] To refuse application of the automatic stay in a situation where the third-party defendant is entitled to indemnity from the debtor, the Fourth Circuit held in *Piccinin*, defeats the very purpose and intent of the Code in providing the stay. *Id.* at 999 (citing *In re Metal Center*, 31 B.R. 458, 462 (D. Conn. 1983) ("[W]here . . . a debtor and a nondebtor are so bound by statute or contract that the liability of the nondebtor is imputed to the debtor by operation of law, then the Congressional intent to provide relief to debtors would be frustrated by permitting indirectly what is expressly prohibited by the Code.")).

Accordingly, for the foregoing reasons, the automatic stay that is applicable to Respondent Chicago Tribune Company should be extended to the individual respondents. To the extent that this Court does not dismiss the petition for certiorari on the merits, Chicago Tribune Company and the individual

---

[1] Pursuant to its Certificate of Incorporation, Chicago Tribune Company has indemnified its directors, officers, employees, or agents to the "fullest extent permitted by applicable law" in connection with any actual or threatened action, suit, or proceeding against them based on their to the company. The Illinois Business Corporation Act of 1983, 805 ILCS 5 *et seq.*, permits an Illinois corporation to provide such indemnification to directors, officers, employees, or agents "if such person acted in good faith and in a manner he or she reasonably believed to be in, or not opposed to the best interests of the corporation." 805 ILCS 5/8.75.

respondents respectfully request that this Court stay all further proceedings relating to the petition for certiorari until such time as the automatic stay expires.

II. *NEW YORK TIMES CO. V. SULLIVAN* IS WELL-SETTLED LAW THAT SHOULD NOT BE DISTURBED.

Petitioner argues that the Court should overturn decades of well-settled defamation law by overruling *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964). In so doing, Petitioner seeks to downplay the gravity of his request by repeatedly characterizing the relief sought as a mere "adjustment" to *Sullivan*. Pet. 9-10. There can be little dispute, however, that Petitioner is asking the Court to turn decades of settled defamation law on its head by overruling an opinion that has been repeatedly hailed by commentators and case law as the Court's seminal decision in the law of defamation. *See, e.g.*, Rodney A. Smolla, Law of Defamation 2:1, 3 (2d ed. 2009) ("*New York Times Co. v. Sullivan* is the starting point for all modern discussion concerning the American law of defamation. The case revolutionized the law of defamation by holding, for the first time, that the traditional tort rules governing the law of libel were subject to the overriding constraints of the first amendment."); *Mangual v. Rotger-Sabat*, 317 F.3d 45, 65 (1st Cir. 2003) ("The seminal *New York Times* case contains several requirements that constrain libel law when the challenged statement is about a public official."); *Ollman v. Evans*, 750 F.2d 970, 975 n. 7 (D.C. Cir. 1984) ("*New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), was, of course, the seminal case in which the Court first imposed constitutional constraints on state libel laws by preventing public officials from

securing libel verdicts unless they could prove by clear and convincing evidence that the challenged statement was made with knowledge of its falsity or in reckless disregard of its truth or falsity.").

According to Petitioner, his proposed sea change in defamation law is warranted by the manner in which media coverage has evolved since *New York Times Co. v. Sullivan* was decided. Pet. 7-8. Although Petitioner's argument implies that the Court has not had an opportunity to consider *New York Times Co. v. Sullivan* in forty-five years (Pet. 6-7), that is simply not the case. Indeed, the Court reaffirmed *New York Times Co. v. Sullivan* in *Masson v. New Yorker Magazine, Inc.* 501 U.S. 496, 510-511 (1991), just eighteen years ago.

Further, notwithstanding Petitioner's argument to the contrary, the fact that *Sullivan* has been undisturbed for forty-five years militates overwhelmingly against granting the Petition. For decades, courts throughout the country have relied upon *Sullivan* as a bedrock principle of defamation law. *Sullivan* has been positively cited over 5,500 times by courts across the nation since it was handed down. Simply stated, there is no reason for the Court to throw out decades of well-settled defamation jurisprudence, particularly on this record as shown below.

III. THE LOWER COURT'S JUDGMENT RESTS ON INDEPENDENT AND ADEQUATE STATE GROUNDS.

Under 28 U.S.C. § 1257(a), the Court lacks jurisdiction over the judgment below because it is based on independent and adequate state law grounds. Following a jury trial, in addition to answering a special interrogatory finding that there was no actual

malice, the jury also determined that the challenged statements were not defamatory. App. 15, 34, 48-50. Based on these findings, the jury returned a general verdict in favor of Defendants. App. 15, 45. Accordingly, because the jury found that the challenged statements were not defamatory, the jury would have returned a verdict in Respondents' favor even under the "adjusted" *Sullivan* standard proposed by Petitioner.

Similarly, the opinion entered by the Illinois Court of Appeals also rests upon independent and adequate state law grounds. App. 1-22. The Illinois Court of Appeals' opinion addressed three points of error raised by Petitioner, all of which are based on Illinois evidence or procedural law. App. 2, 16-22. On those issues, the Court of Appeals held (1) that any error in admitting evidence of prior negative publicity was not reversible error; (2) comments by counsel for the newspaper and reporters during closing argument that the prosecutor kept innocent men in prison for years did not require reversal; and (3) any error in refusing to give certain jury instructions proposed by Petitioner was not reversible error. *Knight v. Chicago Tribune Co.*, 385 Ill.App.3d 347, 358 (Ill. App. Ct. 2008); App. 16-22. The Court of Appeals then went on to dismiss summarily Petitioner's argument that "the law [*New York Times Co. v. Sullivan*] should change to permit him to prevail without clear and convincing evidence of actual malice." *Id.* at 359; App. 21-22. In that context, the Court of Appeals remarked, importantly for purposes of this issue, that *"[a]ll of the alleged errors [Petitioner] found had no bearing on the issue of actual malice."* *Id.* (emphasis added). In short, as the Court of Appeals correctly concluded, Petitioner failed to

present it with a federal issue and, consequently, no federal issue is presented here.

CONCLUSION

Wherefore, Respondents pray that the Court deny the request for a petition for writ of certiorari in this case or, in the alternative, stay all further proceedings relating to the petition until such time as the automatic stay imposed due to Respondent Chicago Tribune Company's bankruptcy has expired.

Respectfully submitted,

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